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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

U.S. GEOTHERMAL, INC. an Idaho corporation, Complainant, vs. IDAHO POWER COMPANY, an Idaho corporation, Respondent.	Case No. IPC-E-04-08
BOB LEWANDOWSKI and MARK SCHROEDER, Complainants, vs. IDAHO POWER COMPANY, an Idaho corporation, Respondent.	Case No. IPC-E-04-10 ANSWER OF IDAHO POWER IDAHO POWER COMPANY TO PETITIONS FOR RECONSIDERATION

COMES NOW Idaho Power Company ("Idaho Power" or "Company"), by and through its attorney, and pursuant to RP 331.05, hereby answers the Petitions for Reconsideration of Order No. 29632 filed by Petitioners Bob Lewandowski and Mark Schroeder and Energy Vision, LLC ("EnVision"). This answer also responds to the e-mail comments provided to the Commission by Gerald Fleishman, Gary Seifert, Kurt Meyers and Leslie Tidwell (collectively "Commenters").

I.

INTRODUCTION

From its inception, § 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, has imposed a difficult balancing act on this Commission and other state regulatory commissions that are required to implement PURPA's provisions. On one hand, PURPA charges state commissions to implement PURPA to encourage the development of qualifying cogeneration and small power production facilities ("QFs"). On the other hand, PURPA requires that commissions provide this encouragement in a manner that ensures that electric utility customers do not pay more for capacity and energy purchased from QFs than they would have paid if the utility had obtained the same amount of energy and capacity by means of constructing resources or purchasing energy or capacity on the wholesale market. 18 CFR § 292.304(a)(2).

Stated another way, PURPA requires that customers be economically indifferent to whether the utility serves their loads with QF resources, utility-owned power plants or utility purchases from the wholesale market. If QF purchase rates and policies are established so that they meet this customer indifference test, the maximum

lawful encouragement to QF development has been provided and this Commission has satisfied its obligations under PURPA. PURPA provides the opportunity for QF developers to move forward with cost-effective projects. However, PURPA does not guarantee that all QF projects will be developed.

Idaho Power is not seeking reconsideration of Order No. 29632. However, as discussed below, Idaho Power has concerns about the effect that the Commission's adoption of the monthly 10 aMW limit will have on the number of wind developers responding to the Company's upcoming request for proposals ("RFP") for acquisition of generation from wind projects. These concerns notwithstanding, the Company will use its best efforts to work with QFs to implement the Commission's decision in Order No. 29632 to encourage QF development and to assure customer indifference thereby fully complying with the requirements of PURPA.

II.

DISCUSSION

A. Commission Order No. 29632 Conferred Substantial Benefits On Intermittent Generating Technologies Like Wind and Solar.

In adopting 10 average MWs per month as the ceiling on entitlement to the posted rates, the Commission substantially departed from past practice. As a result of that change, low-capacity factor resources like wind and solar have received a very significant benefit. Selection of 10 aMW per month as the ceiling on entitlement to posted rates will allow wind projects, whose usual capacity factor is in the 30-33% range, to develop projects with a nameplate capacity of more than 30 MW and still receive the "smaller than 10 MW rates" recently approved by the Commission in Order No. 29646.

This increase in the ceiling provides significant economies of scale to wind developers. The increased ceiling, coupled with recent increases in the posted rates and renewed tax incentives, will strongly stimulate wind development. In fact, Idaho Power is concerned that smaller wind developers may choose not to submit proposals in Idaho Power's upcoming wind RFPs and instead opt to receive posted rates. Idaho Power is moving quickly to issue its RFP for the purchase of approximately 200 MW of wind powered generation by the end of 2007 with 100 MW of that generation to be available by year-end 2006. A copy of the draft RFP has been posted on the Company's website and will be issued formally in the very near future. Time will tell whether wind developers will participate in the RFP or choose not to bid their wind generation projects into the RFP because they have the option of receiving the posted QF rates without competition. Preliminary indications are that a number of developers of smaller wind projects intend to utilize the published QF rates rather than participate in the RFP process.

Even with all of these new competitive advantages, Petitioners assert that they will not be able to develop their wind projects if they are required to make a legally-enforceable commitment as to how much energy they will deliver to Idaho Power each month. Idaho Power believes these claims are overstated and Order No. 29632 represents a reasonable balance of QF and customer interests as required by PURPA.

B. The Commission's Decision To Adopt A Market-Based Pricing Remedy To Be Applied When the QF Fails To Meet Its Minimum Energy Commitment Is Both Lawful and In the Public Interest.

(1) The Commission regularly pursued in its authority in adopting the market-based pricing remedy to be applied when a QF fails to deliver its minimum energy commitment.

In Order No. 29632, the Commission adopted a market-based pricing remedy to be applied when a QF fails to deliver 90% of its monthly contract commitment. Under this market-based pricing remedy, if a QF delivers less than 90% of its monthly contract commitment, the QF is paid for its monthly deliveries at the same market-based prices contained in the Company's Commission-approved rate schedule No. 86.

Petitioners argue that because the market-based pricing remedy adopted by the Commission was not specifically proposed by any party in this case, the Commission is legally precluded from adopting that remedy. To put Petitioners' argument in context, a brief re-cap of the parties' positions on this issue may be useful:

(1) Idaho Power presented testimony and exhibits in support of the 90%/110% performance band that was ultimately adopted by the Commission.

(2) Commission Staff presented testimony and exhibits that supported the performance band concept but proposed that the band be widened to 80%/120%.

(3) In conjunction with the performance band, Idaho Power proposed a "shortfall-energy remedy" that required QFs to pay Idaho Power liquidated damages when a QF failed to deliver 90% of the monthly contract commitment amount.

(4) Commission Staff's testimony supported the shortfall-energy remedy.

(5) The intervenors, Avista and PacifiCorp, generally supported the performance band concept and also testified that a charge for integrating wind resources onto the utility's systems would be another appropriate remedy.

(6) Petitioners Schroeder/Lewandowski testified that no remedy for failure to deliver the minimum energy was appropriate.

In Order No. 29632, the Commission did not adopt the exact recommendation of any of the parties. Instead the Commission adopted a remedy that occupies the middle ground between the Idaho Power/Staff shortfall-energy remedy proposal and the Schroeder/ Lewandowski "no-remedy" position. The adopted market-based pricing remedy is the same remedy currently included in the QF contract between Idaho Power and Tiber Montana LLC for the Tiber Hydro Project. The Tiber Hydro Project was financed and completed in June of 2003 and has been delivering energy to Idaho Power ever since.

Petitioners argue that because the Commission did not adopt either the shortfall-energy remedy or the no-remedy position, the Commission is legally precluded from adopting the market-based pricing remedy. On pages 2 and 3 of their Petition, Schroeder/Lewandowski describe their legal argument this way: "This (the market-based pricing remedy) is a 'solution' that no party to the proceeding proposed or even addressed." (parenthetical added). Lewandowski/Schroeder go on to say: "Because the Commission's decision is not based on the record it is not in conformity with the law." The Lewandowski/Schroeder Petition continues: "The record of this proceeding contains no references to the solution adopted by the Commission and hence fails to meet this basic threshold."

Petitioners seem to be espousing the position that the Commission, in making its decisions, must engage in a process akin to what is commonly known as "baseball arbitration," that is, the Commission can only choose one of the alternatives specifically proposed by the various parties. This position simply is not in conformance with Idaho law.

In *Industrial Customers of Idaho Power v. Idaho Pub. Util. Com'n*, 1 P.3d 786, 134 Idaho 285 (2000), the Industrial Customers of Idaho Power ("ICIP") made the same "baseball arbitration" argument Petitioners are making in this case. In the above-cited ICIP case the Commission had received evidence regarding the appropriate number of years to be used to amortize a deferral balance Idaho Power had accrued from DSM expenditures. The Commission selected a 12 year amortization period. The ICIP argued that evidence was presented to the Commission indicating the reasonableness of 24, 7 and 5-year amortization periods but no evidence was presented discussing the reasonableness of a 12-year period. As a result, the ICIP argued, the Commission could not have selected a 12-year amortization period based on substantial competent evidence in the record. In its opinion, the Idaho Supreme Court held that the Commission was not limited to selecting one of the alternatives presented by the parties. In its opinion the Court stated:

> Appellants argue that evidence was presented indicating the reasonableness of twenty-four, seven, and five year amortization periods but that no evidence was presented discussing the reasonableness of a twelve-year period. This Court has recognized previously that the Commission, as finder of fact, need not weigh and balance the evidence presented to it but is free to accept certain evidence and disregard other evidence. *See Application of Utah Power & Light Co.,* 107 Idaho 446, 451, 690 P.2d 901, 906 (1984). Additionally, the Commission is free to rely on its own expertise as justification for its decision. *See Boise Water Corp. v. Idaho Public Utilities Commission,* 97 Idaho 832, 842, 55 P.2d 163, 173 (1976); *Intermountain Gas Co. v. Idaho Public Utilities Commission,* 97 Idaho 113, 126, 540 P.2d 775, 788 (1975).
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> (*Industrial Customers of Idaho Power v. Idaho Pub. Util. Com'n,* 134 Idaho 285, 293 (2000)).

(2) The Commission's adoption of a market-based pricing remedy is based on substantial competent evidence on the record

Idaho Power Company witness Gale presented extensive testimony describing the rationale underlying the Company's request for both the 90%/110% performance band and the shortfall-energy remedy the Company proposed to implement to provide liquidated damages when QFs fail to meet their minimum contract energy commitment. Commission Staff also provided testimony on the need for a performance band and the shortfall-energy remedy. Avista and PacifiCorp provided testimony, exhibits and other evidence addressing the need for a remedy like the performance band to encourage QFs to provide firm energy in accordance with contract commitments.

There is no question that the extensive testimony in this case supporting the need for a remedy to protect customer interests if a QF fails to perform its contract provides ample evidence upon which the Commission could base its adoption of the market-based pricing remedy.

C. The Market-Based Pricing Remedy the Commission Adopted When QFs Fail To Meet Their Minimum Contract Commitment Is Fair and Reasonable.

Petitioners Schroeder/Lewandowski and EnVision as well as Commenters argue that the market-based pricing remedy selected by the Commission will send incorrect price signals to QF developers. This argument is a classic "red herring." First the Petitioners argue that wind developers cannot control the wind so it is unfair to require a legally-enforceable obligation to provide a specific amount of energy during a month. They then argue that the Commission's market-based price remedy will incent them to

dispatch their generation at inopportune times based on market prices. This argument is internally inconsistent and simply does not match up with reality.

Even assuming that QFs *can* take steps to dispatch their resources to meet the 90% threshold when market prices are below contract prices, that result is acceptable to Idaho Power. This case grew out of the Company's desire to obtain firm, reliable energy commitments from QFs. The Company will use these commitments to make informed resource dispatch decisions. If QFs can perform within the parameters of their contracts, that is precisely the result the Company is seeking from implementation of the 90%/110% performance band and the market-based pricing remedy adopted by the Commission. The Commission recognized the utility's need for predictability when it stated in Order No. 29632: "As reflected in our 10 MW cap discussion, the Commission finds that a legally enforceable obligation translates into contractual obligations for both parties. For a QF it translates into an obligation or commitment to deliver its monthly estimated production." (Order No. 29632 at p. 20).

D. Wind Developers Can Finance Their Projects Even If They Are Required To Commit To Deliver A Monthly Amount of Energy.

Predictably, Petitioner EnVision and the Commenters claims that unless the Commission's Order is changed to eliminate the market-based pricing remedy, it will be impossible for any wind project to obtain financing. Although Idaho Power is not permitted to ask about individual QF project financing, in light of the recent re-instatement of federal tax credits, recent increases in QF purchase prices and improved economies of scale due to the adoption of the monthly 10 aMW ceiling on entitlement to published

rates, Idaho Power is extremely skeptical of Commenters' claim that enforcing a minimum energy commitment from QF developers will make all wind projects unfinancable.

Idaho Power's skepticism is reinforced by the fact that the Company already has contracts with two wind developers and one hydro developer whose contracts contain monthly commitment provisions and market-based remedies for failure to meet those monthly commitments. These remedies are at least as stringent than the market-price based remedy adopted by the Commission in Order No. 29632. All of these projects have received financing and are either completed or currently under construction. In addition, Idaho Power continues to receive requests for contracts for wind generation projects. The developers of those new projects are well aware of the requirements of Order No. 29632 and have indicated they do not believe Order No. 29632 will provide any impediment to financing and constructing these new projects.

E. Availability Factor Is Not A Reasonable Test For Intermittent Resources Like Wind.

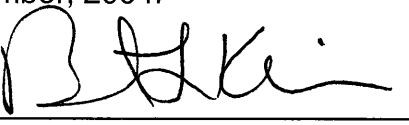
Both Petitioners now argue for the first time that the Commission should consider requiring QFs to provide a minimum availability factor rather than actually committing to provide any specific monthly amount of energy. Petitioners argue that availability factor is a common utility standard for measuring reliability. While Petitioners are correct that availability factor is one common utility measurement of reliability, Petitioners fail to mention that availability factor only has meaning when it is applied to a generating facility that is dispatchable. Availability factor is meaningless when applied to intermittent resources that only have fuel on an if, as and when-available basis. Having a unit available without fuel to operate the unit provides no reliability value to the utility.

CONCLUSION

Commission Order No. 29632 represents a reasonable balancing of the interests of QF wind developers and utility customers. Under Order No. 29632, Petitioners have the sole discretion to decide how much firm energy they want to commit to provide each month. They know better than anyone what are realistic estimates of the amount of energy they can expect to deliver on a firm basis each month. The Commission correctly determined that it is not unreasonable to expect a QF that is being paid firm energy prices to enter into a firm legally-enforceable obligation to supply firm energy.

WHEREFORE, Idaho Power respectfully requests that this Commission deny Petitioners' Petitions for Reconsideration.

Respectfully submitted this 20th day of December, 2004.



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Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of December, 2004, I served a true and correct copy of the above and foregoing ANSWER OF IDAHO POWER TO PETITIONS FOR RECONSIDERATION upon the following named parties by the method indicated below, and addressed to the following:

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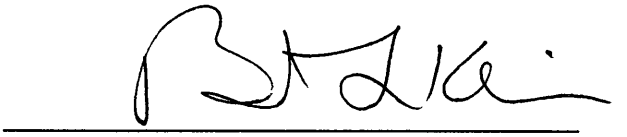

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